



POLICE DEPARTMENT

August 13, 2015

MEMORANDUM FOR: Police Commissioner

Re: Detective David Lopez
Tax Registry No. 911303
Detective Borough Bronx
Disciplinary Case No. 2014-12350

Detective John Gengo
Tax Registry No. 881817
Detective Borough Bronx
Disciplinary Case No. 2014-12349

The above-named members of the Department appeared before me on June 30, 2015, charged with the following:

Disciplinary Case No. 2014-12350

1. Said Detective David Lopez, on or about September 10, 2013, at approximately 0800 hours, while assigned to the Detective Borough Bronx and on duty, [REDACTED], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
PROHIBITED CONDUCT

2. Said Detective David Lopez, on or about September 10, 2013, at approximately 0800 hours, while assigned to the Detective Borough Bronx and on duty, [REDACTED], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
PROHIBITED CONDUCT

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Disciplinary Case No. 2014-12349

1. Said Detective John Gengo, on or about September 10, 2013, at approximately 0800 hours, while assigned to the Detective Borough Bronx and on duty, [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
PROHIBITED CONDUCT

2. Said Detective John Gengo, on or about September 10, 2013, at approximately 0800 hours, while assigned to the Detective Borough Bronx and on duty, [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
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The Civilian Complaint Review Board (CCRB) was represented by Suzanne O'Hare, Esq., Respondents Lopez and Gengo were represented by Michael Lacondi, Esq.

Respondents through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2014-12350

Specification 1: Respondent Lopez is found Not Guilty.

Specification 2: Respondent Lopez is found Not Guilty.

Disciplinary Case No. 2014-12349

Specification 1: Respondent Gengo is found Not Guilty.

Specification 2: Respondent Gengo is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The CCRB's Case:

CCRB called Eva McFadden as a witness. McFadden works as a client care manager, and is in her final year of studying for her masters in marital family therapy. McFadden testified that shortly before 9:00 a.m. on September 10, 2013, she heard a knocking on her apartment door [REDACTED] McFadden and [REDACTED] 38-year old Person A, [REDACTED] were the only two occupants of the apartment at the time. The people knocking identified themselves as "police", and McFadden opened the door. Respondent Gengo walked into the apartment, followed by Respondent Lopez. According to McFadden, while Respondent Gengo stood by the front door, Respondent Lopez began searching inside the apartment. McFadden asked why they were there, and Respondent Gengo said they had a warrant to search the apartment for Person A and for Person B, who was wanted in connection with a recent domestic violence assault on McFadden's daughter. McFadden stated that she saw Respondent Gengo holding a paper that said "warrant" across the top, but it didn't look real to her because it was on regular paper. McFadden's suspicions were further aroused because Person A had been in a federal penitentiary for seven or eight years at the time (Tr. 17-19).

McFadden testified that she asked to see the warrant, and when Respondent Gengo refused, she asked the detectives to leave. Despite repeating her request that they leave "maybe around five, six, seven [times,] maybe more," the detectives remained inside the apartment, as Respondent Lopez continued to search; the detectives told her they didn't have to leave because they had a warrant to search her home (Tr 22).

McFadden observed Respondent Lopez searching in her living room and bedroom, "looking through (her) stuff, moving (her) furniture", and looking under the bed and in a closet. Respondent Gengo remained by the front door during the search. The detectives were there for "maybe 10 minutes, maybe shorter" before finally leaving (Tr. 21-22).

McFadden acknowledged that she "opened (the door) widely" for the detectives when they first arrived, thinking they were there in connection with her daughter's case (Tr. 31). In her CCRB statement, McFadden specifically stated that "I didn't have an issue with him stepping, when he stepped into my apartment" (Tr. 27). It was only after they weren't forthcoming about the warrant that she became "fearful", particularly with Person A present, and began repeatedly asking them to leave (Tr. 29).

The Respondents' Case:

Each Respondent testified on his own behalf. Respondent Lopez testified that he has been with the Department for 23 years, and has gone to locations on an I-card thousands of times. An I-card gives the detectives probable cause to make an arrest, but it's not an arrest warrant (Tr. 61-62). Because of the high volume of such cases he's handled, Respondent Lopez had no specific memory of this particular incident, presumably because nothing "jumped out" about it; he was only able to testify about his general practices in such situations. According to the detective, whenever he and his

partner, Respondent Gengo, went to a location where they were not given consent to enter, they just moved on to the next location, since they had so many places to cover (Tr. 54-55).

Respondent Lopez testified that since this case arose in the 42 Precinct, Respondent Gengo would have been the lead detective and done the searching, while Respondent Lopez would be the backup. As the backup, Respondent Lopez would have been responsible for security: he would be outside, watching the fire escape, the window, and the front door (Tr. 56).

Respondent Gengo, who has been with the Department for 31 ½ years, also testified. According to the detective, he and Respondent Lopez went [REDACTED] looking for Person B based on an I-card they had for him (Resp. Ex. A). Additionally, Respondent Gengo acknowledged that he was carrying a 2006 warrant for Person A, which he had pulled from the file before heading to the location, in case they happened to come across Person A while they were there (Tr. 94). Initially, the detective insisted he never showed that warrant to McFadden (Tr.80) or even mentioned it (Tr. 99); however in his prior statement to CCRB on April 8, 2014, Respondent Gengo said that he might have told McFadden about the warrant (Tr. 99).

Respondent Gengo testified that they knocked on the door and McFadden answered. The detectives explained why they were there, and McFadden invited them in (Tr. 71, 84). Respondent Gengo acknowledged, though, that in his prior statement to CCRB, he had stated that he couldn't specifically recall the circumstances under which they entered the apartment, but was sure they were invited in (Tr. 86).

According to Respondent Gengo, he informed McFadden that they were looking for her daughter and for Person B. McFadden verbally consented to having Respondent Gengo look around the apartment for Person B, though she was uncooperative in providing any information to help locate her daughter or Person B (Tr. 90). Respondent Gengo testified that this was his case, so he was the one who "looked around, did a canvass of the apartment," (with negative results), while Respondent Lopez remained by the door as security the entire time and did not search at all (Tr. 73, 76). Respondent Gengo denied that McFadden ever asked them to leave (Tr. 90). After completing his search, which included looking in the closets and under the bed, "anywhere somebody can hide," Respondent Gengo handed his card to McFadden, and the detectives left the apartment to move onto their next case (Tr. 73, 91).

FINDINGS AND ANALYSIS

Respondents are charged with entering and searching McFadden's apartment without sufficient legal authority. It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. However, it also is well-settled that police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority over the premises to be inspected. See *People v. Adams*, 53 NY2d 1 (1981).

It is undisputed that Respondents here did not possess a warrant to enter and search McFadden's home; they went to the apartment based on an I-card, and by Respondent Gengo's own admission, the 2006 warrant they had for Person A "wasn't

relevant" to the business they were there to conduct on September 10, 2013. Both parties agree, then, that the issue in this case is whether Respondents had valid consent to enter and search the apartment. Having observed each of the witnesses testify at the hearing, taking into account their demeanor on the stand and the consistency of their statements, this tribunal credits Respondents' contention that there was valid consent to enter, but also finds that Respondent Gengo continued to search inside the apartment even after McFadden effectively withdrew that consent.

Since the apartment was McFadden's home, she clearly had the authority to consent to the police entry. By McFadden's own admission, she opened the door wide for the police to enter her apartment, and, at least initially, didn't seem concerned about the detectives stepping inside. She believed, correctly, that the detectives were there in connection with the case in which her daughter was an alleged victim. Since McFadden gave Respondents valid consent to enter the apartment, I find them each "Not Guilty" of the first specification.

However, this tribunal credits McFadden's testimony that Respondent Gengo was unresponsive to her request to see the warrant, and that she then repeatedly told them to leave. McFadden insisted that the detectives told her they had a warrant to search the apartment, and that she saw Respondent Gengo holding a paper with the word "warrant" written on the top; this testimony was corroborated by Respondent Gengo's admission that he did, indeed, have a warrant for Person A in his possession that morning. Even though Respondent Gengo testified that he didn't mention the warrant to McFadden, that claim is undermined by his prior CCRB statement where he acknowledged that he might have told McFadden about the warrant.

Once McFadden asked the detectives to leave, a request that she repeated multiple times, her original consent to enter the apartment was effectively revoked, and the detectives no longer were permitted to rely upon the earlier consent. However, rather than leave as requested, Respondent Gengo continued to search the apartment. Since he did this without a warrant, after consent had been withdrawn, I find Respondent Gengo "Guilty" of Specification 2.

Respondent Lopez, though, merely stood by the front door and did not partake in the search at all. Although McFadden named Respondent Lopez as the one who searched her apartment, and she was otherwise detailed and consistent in her account, this tribunal credits Respondent Gengo's testimony that it was, in fact, Respondent Gengo who did the searching; McFadden likely was confused and mistaken in stating that it was Respondent Lopez. Even though Respondent Lopez could not recall the specific details of this incident, and his testimony has limited probative value, he did confirm that as a general practice it would be the lead detective on the case (here, Detective Gengo) doing the searching, while the backup detective (in this case, Respondent Lopez) would stay by the door as security. While Respondent Lopez did remain at the location after McFadden had requested that the detectives leave, he was there performing an important security function as backup for Respondent Gengo. Since this tribunal finds that CCRB did not meet its burden of proving that Respondent Lopez actually participated in the search, I find Respondent Lopez "Not Guilty" of Specification 2.

PENALTY

Disciplinary Case No. 2014-12349

In order to determine an appropriate penalty, Respondent Gengo's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

Respondent Gengo was appointed to the Department on January 4, 1984. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Gengo has been with the Department for 31 ½ years, and a detective since 1992, with no disciplinary history in the past 10 years. His Commanding Officer rated him a 10 out of 10. CCRB has recommended that the detective forfeit 10 vacation days, which is a penalty consistent with other cases involving a similar offense.

However, since he has been found "Not Guilty" on the Unlawful Entry charge, and in light of his longtime dedicated service to the Department, the recommended penalty seems somewhat excessive.

In *Disciplinary Case No. 80207/04 (2005)*, a detective with 14-years on the force forfeited five vacation days and received reinstruction for wrongfully searching an apartment based on consent, where that consent was deemed involuntary because of an implied threat to break down the door. In that case, Respondent also was found guilty of wrongfully detaining an occupant of the apartment.

Here, Respondent Gengo and his partner entered the apartment with the consent of McFadden. Respondent Gengo's misconduct occurred when he continued to search after repeatedly being asked to leave. But the search was brief in its intrusiveness, and

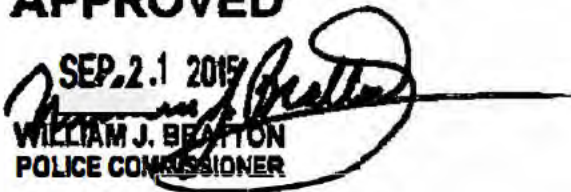
under the totality of circumstances I recommend that Respondent Gengo forfeit three vacation days as an appropriate penalty.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner – Trials

APPROVED

SEP. 2.1 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE JOHN GENGO
TAX REGISTRY NO. 881817
DISCIPLINARY CASE NO. 2014-12349

Respondent received an overall rating of 4.5 on his last three annual performance evaluations. He has been awarded five medals for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]

In 2004, he pleaded guilty and forfeited 12 vacation days for leaving the scene of an accident while off-duty and operating a FBI vehicle.

In 2005, he pleaded guilty and forfeited 10 suspension days and 20 vacation days for performing unauthorized overtime and entering incorrect information on overtime reports he submitted in order to justify his requests for overtime.

For your consideration.



Jeff S. Adler
Assistant Deputy Commissioner – Trials